

COMMITTEE WORKSHOP
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)	
)	
Proposed Adoption of Regulations)	Docket No.
Establishing a Greenhouse Gases)	06-OIR-1
Emission Performance Standard for)	
Baseload Generation of Local Publicly)	
Owned Electric Utilities)	
_____)	

CALIFORNIA ENERGY COMMISSION

HEARING ROOM A

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

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9:05 A.M.

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COMMISSIONERS PRESENT

Jeffrey D. Byron, Presiding Member

John Geesman, Associate Member

ADVISORS PRESENT

Kevin Kennedy

Suzanne Korosec

STAFF PRESENT

Lisa DeCarlo

Chris Tooker

ALSO PRESENT

Bruce McLaughlin, Attorney

Braun and Blaising, P.C.

California Municipal Utilities Association

Audrey Chang

Natural Resources Defense Council

Martin R. Hopper

MSR Public Power Agency

Silicon Valley Power

City of Santa Clara

Jane E. Luckhardt, Attorney

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representing SMUD; on behalf of CMUA

I N D E X

	Page
Proceedings	1
Opening Remarks	1
Commissioner Byron	1
Introductions	2
Workshop Overview	3
Discussions:	3
Proposed Remedies to Address OAL's First Reason for Disapproval	3
Proposed Remedies to Address OAL's Second Reason for Disapproval	5
Proposed Remedies to Address OAL's Third and Fourth Reasons for Disapproval	8
Schedule	41
Closing Remarks	42
Adjournment	42
Reporter's Certificate	43

1 P R O C E E D I N G S

2 9:05 a.m.

3 COMMISSIONER BYRON: Good morning,
4 everyone. Welcome to an Electricity Committee
5 meeting that was -- I should say public meeting of
6 the Electricity Committee for the adoption of
7 regulations pursuant to SB-1368.

8 You may recall that on May 28th we
9 adopted such regulations implementing a greenhouse
10 gas emission performance standard for baseloaded
11 generation of publicly owned utilities. And the
12 final rulemaking package was submitted to the
13 Office of Administrative Law June 1st with the
14 request for an expedited review.

15 And I'd certainly like to thank the
16 Administrative Law Judge providing that expedited
17 review. On June 29th he issued a decision
18 disapproving the rulemaking. However, I think
19 we're very close to completing a couple of open
20 item which I hope, Ms. DeCarlo, you'll take us
21 through --

22 MS. DeCARLO: Yes.

23 PRESIDING MEMBER BYRON: -- in order.
24 But he did confirm, obviously, by approval of --
25 or the inference of approval of the other aspects

1 of the regulations that many of the major issues
2 have been adopted.

3 So, as I said, I think we're very close.
4 We have a couple of issues to settle. And I'd
5 like to thank very much the responses that we
6 received in a timely manner. I read them late
7 last night and early this morning. And for being
8 here today, I'd like to thank everyone that's here
9 to provide public comments.

10 I only received two sets of public
11 comments, correct?

12 MS. DeCARLO: That's all I see, yes.

13 PRESIDING MEMBER BYRON: Okay, great,
14 thank you. So, with that, Commissioner Geesman,
15 would you like to add anything before I turn it
16 over to Ms. DeCarlo?

17 ASSOCIATE MEMBER GEESMAN: Only that I
18 believe each of the two sets of public comments
19 were filed by multiple entities, so we do have
20 several different entities represented by the two
21 comments, and presumably by the two
22 representatives here at the table.

23 PRESIDING MEMBER BYRON: Okay. And in
24 addition to myself here at the dais this morning
25 is my Senior Advisor Kevin Kennedy, who's in his

1 last day or two of service to this organization.

2 And Ms. Suzanne Korosec, who is Commissioner
3 Geesman's Advisor.

4 So, with that, Ms. DeCarlo, would you
5 take us through these and we'll make sure we give
6 everybody an opportunity to comment on each of the
7 points.

8 MS. DeCARLO: Sure. Lisa DeCarlo, Staff
9 Counsel for the California Energy Commission. I
10 guess the order I put in the agenda is just
11 starting from the order that OAL identified. And
12 actually it's convenient because it goes from
13 somewhat minor issues to end up with the really
14 big issue that we'll need to address today.

15 So the first item is OAL's concern over
16 section 2900, the scope provision over a clarity
17 standard that concerned it doesn't meet the
18 requirements for clarity. And I'll read what
19 specifically they said in their itemized bullet
20 list:

21 It is unclear whether procurements
22 involving power plants under 10 megawatts are
23 covered by or exempt from the greenhouse gases
24 emissions performance standard established by the
25 California Energy Commission. Consequently, the

1 regulations fail to satisfy the clarity standard
2 of Government Code section 11349.1.

3 And CMUA has proposed some language
4 changes to try and address that. I don't know if
5 the various parties want to discuss those changes
6 at this point?

7 MR. McLAUGHLIN: I, no need to discuss,
8 I think. We're right on board, we were from the
9 beginning, I think. And so this language was our
10 best attempt to effect the purpose of the statute,
11 clearly.

12 MS. DeCARLO: I still have some
13 reservations about the language proposed, only in
14 that when I spoke with the OAL representative his
15 feeling was that we really need to make an
16 affirmative statement that power plants under 10
17 megawatts are still covered by the EPS in some
18 fashion.

19 MS. CHANG: That's fine with me.

20 MS. DeCARLO: Okay.

21 ASSOCIATE MEMBER GEESMAN: I don't think
22 there's any dispute that they are covered by the
23 EPS.

24 PRESIDING MEMBER BYRON: Right.

25 MS. DeCARLO: Okay, so we can draft some

1 language to that effect and send that out for 15-
2 day language.

3 MR. McLAUGHLIN: That'd be fine.

4 MS. DeCARLO: Okay. So, item number 2
5 was OAL's concern that there wasn't sufficient
6 explanation or justification for the exemption for
7 under 15 megawatt additions to existing deemed-
8 compliant facilities.

9 And specifically they stated: The
10 rulemaking record does not demonstrate that the
11 exemption from the greenhouse gases emissions
12 performance standard for investments in generating
13 units added to a deemed-compliant power plant that
14 results in an increase of less than 50 megawatts
15 is reasonably necessary to implement, interpret or
16 make specific Public Utilities Code sections 8340
17 and 8341. Consequently, the exception fails to
18 satisfy the necessity standard of Government Code
19 section 11349.1.

20 And CMUA provided some additional
21 explanation for why they believe the provision is
22 necessary, relying a lot on the CPUC's discussion
23 of the topic in their decision.

24 PRESIDING MEMBER BYRON: Well, and that
25 was the basis for our selecting that 50 megawatt

1 limit, was it was identical to what the PUC had
2 cited. Was it our failure on the part of the OAL
3 attorney for us to adequately reference that?

4 MS. DeCARLO: I think the initial
5 concern arose because we did not discuss it in the
6 initial statement of reasons, because it was in
7 the definition section. So I think the ultimate
8 concern, even though we did discuss it
9 subsequently in several workshops, was that it did
10 not go out in that official document.

11 So, I think if we provide explanation in
12 the 15-day language, a discussion, a full
13 discussion, incorporating CPUC's decision language
14 and CMUA's explanation, as well, I think that
15 should satisfy OAL, though, you know, I can't make
16 any guarantees.

17 MR. McLAUGHLIN: Just one comment here.
18 Bruce McLaughlin, CMUA. As we thought the CPUC's
19 arguments were cogent, and therefore we added them
20 to our similar arguments on the logical reasons
21 why that's necessary to effectuate the purpose, we
22 are not relying upon the consistency argument
23 because we do not believe you must be exactly the
24 same in all respects in your regulations. There
25 are certain limited areas.

1 So, anyway, we didn't rely upon that,
2 but certainly upon their arguments, which we
3 thought were correct.

4 ASSOCIATE MEMBER GEESMAN: Which were,
5 and again are, a part of our record. So in terms
6 of satisfying OAL it would seem to me that CMUA's
7 comments reaffirm what's in our record. We can
8 cite to that if OAL has any concern with it.

9 MS. DeCARLO: Right. I would like to
10 include some discussion or 15-day language
11 submittal just to cover our bases. Because that
12 was suggested by the OAL attorney.

13 ASSOCIATE MEMBER GEESMAN: As I
14 understand it, there's not any difference among
15 any of the parties as to the 50 megawatt
16 threshold.

17 MS. DeCARLO: Not at all. It's part of
18 our consistency --

19 ASSOCIATE MEMBER GEESMAN: Okay.

20 MS. DeCARLO: -- PUC, as well.

21 PRESIDING MEMBER BYRON: Right. And, in
22 fact, of course we have two parties at the table.
23 Is there anyone else that would like to comment on
24 that, or even the previous issue that we've
25 already passed by?

1 DR. TOOKER: Commissioners, so far we
2 have four people on the line. None of them wish
3 to comment at this time. They're just listening.

4 PRESIDING MEMBER BYRON: All right.
5 Please interrupt at any time if they do.

6 DR. TOOKER: Okay. And the people we
7 have listening are representing Duke, Williams,
8 MERC Irrigation, Bear Valley Electric. Thank you.

9 PRESIDING MEMBER BYRON: Okay, thank
10 you.

11 MS. DeCARLO: So that brings us to our
12 final item, and the most critical, I believe. The
13 concern -- OAL's expressed concern over our
14 discussion of exemption for a 10 percent increase
15 in rated capacity under section 2901(j)(4)(B).

16 And their specific concern is stated as:
17 It is not clear whether the exemption from the
18 greenhouse gases emissions performance standard
19 for investments resulting in an increase of no
20 more than a 10 percent increase in rated capacity
21 is limited to investments for routine maintenance.

22 And then their other concern was that
23 the record does not show that the public has been
24 given an opportunity to comment on the evidence
25 the Energy Commission is relying upon to

1 demonstrate that the exemption from the greenhouse
2 gases emissions performance standard established
3 by 2901(j)(4)(B) is reasonably necessary to
4 implement the purpose of Public Utilities Code
5 section 8340 and 8341.

6 PRESIDING MEMBER BYRON: All right, so
7 we can take these two items together because we
8 intend to have sufficient public comment at this
9 time to address the latter item.

10 MS. DeCARLO: Yes.

11 PRESIDING MEMBER BYRON: Okay.

12 MS. DeCARLO: So I don't know if the
13 parties want to jump in. CMUA proposed some
14 language. Maybe we can start with them to explain
15 why they believe that language is necessary under
16 SB-1368.

17 MR. McLAUGHLIN: Thank you. Bruce
18 McLaughlin, CMUA. I would like hopefully this to
19 be a workshop and I would like to discuss this
20 issue. I presented my comments yesterday to Ms.
21 Chang, and so she's had an opportunity to look at
22 them. But we have not discussed the ramifications
23 of what we're suggesting. And so I want to
24 propose why this language is constrained to what
25 the issue was.

1 They talked about the 10 percent and
2 whether it applied to routine maintenance or not.
3 But actually we saw it as that prong of 2901(j) (4)
4 coming under question.

5 And it has to do with the definition of
6 what a long-term financial commitment. And if the
7 Commissioners will indulge me for a minute, I've
8 got my stack of recycled paper here, and I think
9 it's important because it's really critical that
10 we understand, I think, what the statute is saying
11 and what the limit of the long-term financial
12 commitment is. And the discretion of this
13 Commission to define that.

14 And so, as I hold up this piece of
15 paper, this is symbolizing all the generation in
16 California. And we know that 1368 does not apply
17 to all the generation, but I'm ripping off a
18 section here. And this is the generation that's
19 60 percent capacity factor or greater.

20 So right away we know that this
21 generation here does not have 1368 applicability.
22 And yet all the baseload generation in California
23 right now, as it stands, 1368 is not applicable
24 because it has to be triggered. So there's some
25 trigger that causes this baseload generation to

1 come under 1368 or not.

2 And so what I'm going to do is rip out a
3 portion of this baseload generation. And so we
4 know that there is some baseload generation in
5 this state that 1368 does not apply to, short-term
6 investments, whatever. We just know that there is
7 something.

8 This other portion here is a long-term
9 financial commitment. That is also defined in the
10 statute, in 8340(j). And we know that that's
11 bifurcated, so a long-term financial commitment in
12 baseload generation is either a contract greater
13 than five years, or a new ownership investment.
14 And that's where the trouble comes in.

15 This is the portion of owned power
16 plants that are 60 percent capacity factor or
17 greater. But the statute does not define that.
18 And that's where the Commission comes in. You
19 have the obligation, duty, leeway, discretion to
20 define what that new ownership investment is. And
21 that's what we're talking about right here,
22 2901(j)(4).

23 And so I am suggesting, CMUA is
24 suggesting that to define the scope of this little
25 piece of paper here, we need to go to the statute.

1 And so now I'm going to take this little piece,
2 and it's this big piece here. So this is a long-
3 term financial commitment in baseload generation,
4 new ownership investment.

5 And so I want to define the boundaries
6 of this. I go to the first section of the
7 statute. What is the purpose of the statute,
8 because that's what we're trying to do here, to
9 effectuate the purpose of the statute.

10 And we look at section 1(i) and 1(j) and
11 it talks about that EPS, emissions performance
12 standard, in baseload generation, for a long-term
13 financial commitment, will reduce potential for
14 financial risk. It will reduce the potential for
15 reliability risk.

16 So that defines what's got to be in
17 here. So something that -- because it says it
18 will. So it's got to actually do that.

19 So, if, in fact, there are items in here
20 that do not affect reliability; in fact, maybe
21 perchance decrease risk of reliability problems,
22 or decrease future financial problems, it should
23 not be within this definition. In fact, if it was
24 within this definition, not only would you not
25 effectuate the purpose of the statute, you would

1 violate the statute.

2 And so we're suggesting language that
3 more accurately describes what's not in this.
4 Because the PUC decisional language, 200 pages of
5 it, goes into discussion. They have their one-
6 line rule, but then you can go to the discussion
7 and they talk about pollution control improvements
8 and other activities that do not cause
9 backsliding, as they call it. And so they're
10 describing for their regulated entities how to
11 define that long-term financial commitment; and
12 when it does, in fact, cross the line.

13 We don't have the same thing here
14 because all we have are regulations and we have
15 one sentence that says the capacity increase. And
16 so I'm suggesting that a capacity increase does
17 not necessarily increase risk of financial risk or
18 increase reliability risk because it could be an
19 incidental increase -- or capacity.

20 And, for instance, I think we have to
21 look at AB-32 as we define this. These were two
22 regulations or laws that were passed in the same
23 legislative session. They have the basic same
24 grand goal of reducing greenhouse gas emissions.
25 And 38562(a) and 38562(b)(3) describe that CARB

1 will draft or adopt regulations to achieve the
2 maximum technologically feasible and cost
3 effective reductions in greenhouse gas emissions.

4 And so if we take some of those
5 activities out of -- take the opportunity away
6 from the POUs to work with existing plants to
7 reduce emissions, and also have early voluntary
8 reductions before AB-32 even comes into effect in
9 2012, we are effectively violating 1368 and these
10 two principles I was talking about, because now we
11 are preventing POUs from achieving reductions now,
12 which will reduce their risk in the future.

13 And so I'm suggesting that 38562 of the
14 Health and Safety Code from AB-32 is a good
15 standard that could guide your interpretation of
16 this prong.

17 Our language suggests some viable
18 descriptions of activities that should be allowed.
19 In 2901(j)(4) we have the three prongs. We have
20 the five-year extension; we didn't take that out.
21 Even though you know we love it so much. And so
22 it's still there.

23 And these are or prongs. So, in other
24 words, if you trigger any of these three prongs
25 you're under. So if you're five years or greater,

1 not routine maintenance, the regs say it triggers.

2 The last one, which I actually reversed
3 the order, where you convert a nonbaseload to
4 baseload, you trigger.

5 Another one, as proposed by the CPUC,
6 and as proposed by NRDC, any emission increase
7 would trigger. Well, that could cause problems
8 because that any-emission-increase could be an
9 incidental increase, or even it could be an
10 intentional increase, but the fact is it's
11 reducing emissions as they achieve, or attempt to
12 achieve their maximum technologically feasible
13 cost effective reductions on a non-deemed-
14 compliant plant.

15 So, we have suggestions that any
16 activities to preserve the plant reliability or
17 prevent acid deterioration should be articulated
18 right here in the regulations because we're
19 talking about POUs' boards, committees, et cetera,
20 who will be making these decisions on their
21 facilities.

22 And to come here to the Commission, can
23 we do this activity, can we spend this money here,
24 you need to have a proper scope on the activities
25 that we actually bring to the Commission for

1 review.

2 Also complying with legal requirements.

3 I'm sure you've read the news, but we've got a
4 lawsuit that I guess is starting up right now
5 between IPP and others. So there are certainly
6 implications there if we're required to decide
7 between no action on a plant and shutting down a
8 plant or divesting a plant that's just, we pointed
9 out in our written comments, that's just a false
10 distinction that these regs should not force us
11 into.

12 And then achieving environmental
13 improvements. That seems like right in line with
14 the purpose of 1368 and the purpose of AB-32. If,
15 in fact, we're investing in these plants that will
16 achieve environmental improvements now and into
17 the future as we ramp down on our GHG emissions,
18 that seems like something that 1368 should at
19 least allow, as opposed to prevent. And if we
20 have any emission -- any capacity increase, as a
21 separate prong, that could impact those activities
22 immensely.

23 I'll take a breath.

24 MS. CHANG: If I may. Audrey Chang with
25 NRDC. First one minor correction. I like your

1 diagram with the, you know, the illustration with
2 the paper. But when you're talking about all
3 power plants, you said in California. I just want
4 to be clear that it applies equally in-state and
5 out-of-state, it's not just facilities that are
6 owned in California.

7 MR. McLAUGHLIN: That's correct.

8 MS. CHANG: Just a minor clarification.

9 MR. McLAUGHLIN: Yeah.

10 MS. CHANG: Thanks, Bruce, for that. We
11 haven't had a tremendous time to weigh this
12 through, but I can give you some initial
13 reactions.

14 I think you're right that SB-1368 and
15 AB-32 were passed at the same time and same year,
16 last year. But they are also distinct pieces of
17 legislation. And I do think that we have the duty
18 to read each piece of legislation on its own.

19 I mean I'd be willing to think about
20 this a little bit further. I still have some
21 remaining concerns in that it may open up or leave
22 open some possible loopholes that would be
23 contrary to the intent of SB-1368.

24 I know that you may be asking for sort
25 of an example of exactly what I'm thinking of. I

1 think it's a moot point now, but an example is say
2 the Mojave plant, where we are facing a major
3 decision at that point involving over a billion
4 dollars worth of investment; a very significant
5 amount. That would have possibly led that plant
6 to be continued operations for 20, 30 years,
7 perhaps, which definitely would present still a
8 very significant financial and reliability risk.

9 I'm not clear that that type of example
10 would be preventive through this language. And
11 that's where a lot of the significant concern lies
12 from our end.

13 MR. McLAUGHLIN: Do you think that the
14 Mojave plant would have been captured by the five-
15 year prong, though? I mean that's still in there.
16 So, in other words, no matter what it did on -- if
17 it didn't increase emissions at all, still that
18 five-year prong is still there. So, it's the
19 gatekeeper.

20 And so it's a billion dollar investment,
21 if, in fact, the plant is going to go down and it
22 was scheduled to go down. And all of a sudden
23 they're changing their mind and spending a
24 billion. To me that would trigger the first
25 prong.

1 MS. CHANG: Okay, perhaps for that
2 example, but I'm just still not entirely sure if
3 this -- I mean I'm just concerned that there might
4 be still some loopholes left. And I can't tell
5 you exactly all the examples. I mean I don't know
6 exactly what all the examples would be, but I'd
7 just be concerned that there are loopholes.
8 That's just one example.

9 MR. McLAUGHLIN: Right. And certainly
10 we're not proposing loopholes. We're not
11 attempting to get loopholes. We're attempting to
12 demonstrate logical reasons why we need a little
13 bit more clarification.

14 ASSOCIATE MEMBER GEESMAN: Let me jump
15 in and kind of share with you my discomfort here.
16 And I truly wish that OAL had approved the regs as
17 they had been proposed. I recognize that neither
18 of you two necessarily share that belief, but I
19 think the original package should have been
20 approved.

21 Having said that, Bruce, let me --
22 assume that in a case-specific situation where one
23 of your members brought an issue to the
24 Commission, after these regs were adopted, and
25 said this plant ought to be exempted because it

1 either preserves plant reliability or prevents
2 acid deterioration, or it's necessary to comply
3 with some legal requirement, or it will achieve
4 environmental improvements.

5 Assume that I or some future Commission
6 agreed with that. And assume that we have enough
7 discretion, under the case-by-case provision of
8 the regs that OAL has accepted, to make that
9 determination, isn't that a better way to deal
10 with Audrey's discomfort than trying to say now,
11 as a matter of law, the authority the Legislature
12 has given us five timid mice allows us to
13 categorically create these exemptions?

14 MR. McLAUGHLIN: Commissioner, I
15 expected that question. Essentially what you're
16 saying is who should be responsible for making
17 this decision. Should it be the POU or should it
18 be this Commission.

19 And so, of course on one extreme I would
20 like to argue that we make all our decisions.
21 But, of course, we know 1368 doesn't allow that.
22 So there's a line we draw where it's your decision
23 versus ours.

24 And so we're trying to provide more
25 clarity in the regulations, since we are the

1 directly regulated affected parties, so that we
2 can make those decisions on our own. And decide
3 whether we need to present them to this
4 Commission.

5 In the alternative, and you know I like
6 to argue in the alternative, if, in fact, we had
7 regs where we did need to come to you more often,
8 I'd certainly like it to be stated in this record
9 that you recognize that a lot of these activities
10 are good and proper.

11 And that, I mean we've got folks that
12 are looking at possibilities for long-term
13 financial commitments, should I call them. And
14 they need to analyze 1368. And this could make a
15 huge difference in short-term and long-term
16 emissions.

17 And these are governing boards, et
18 cetera, et cetera, et cetera. So that's my
19 answer, Commissioner. I mean we would prefer to
20 make these decisions ourselves with clear
21 guidelines.

22 ASSOCIATE MEMBER GEESMAN: And I believe
23 in clarity, and the benefit from clarity. But,
24 Senator, I think you should have put that in the
25 bill if you intended that level of clarity. Or

1 maybe it was just an oversight that you didn't.

2 Let me take the environmental
3 improvement language that you've got. I suspect
4 that's probably an area where most of us agree
5 there ought to be some reconciliation or
6 harmonization.

7 But let's say you've got a project where
8 you're contemplating doing something with the
9 cooling system. Say that 316(b) review prompted
10 by the Clean Water Act requires a decision to
11 either make some investment changing the cooling
12 system, or you shut down the plant.

13 I think that there are a lot of people
14 that would argue SB-1368 doesn't provide this
15 Commission or anyone else with the authority to
16 waive the provisions of SB-1368 simply in order to
17 accomplish that improvement in the cooling system,
18 which would, in fact, be an environmental
19 improvement.

20 And I'm going to guess, I'll attribute a
21 position to the environmental organizations,
22 they'd probably say scrap that investment and
23 invest in energy efficiency or renewable sources
24 of energy.

25 Doesn't this language that you've put

1 forward throw us right into the midst of that kind
2 of dilemma?

3 MR. McLAUGHLIN: This language could be
4 cleaned up. However, just in response to the
5 example you gave, that sort of brings to the
6 forefront some of the ambiguity in the life-of-
7 the-plant prong, which we're not arguing today.

8 But these are the types of troubling
9 problems that will be presented to POUs from this
10 point forward.

11 ASSOCIATE MEMBER GEESMAN: You don't
12 disagree, and that's a good argument for statutory
13 clarification. But I don't know that we have the
14 ability to clarify the statute by exercise of our
15 regulatory authority.

16 And if we do, I would suggest that's
17 better utilized in a case-specific review rather
18 than generically say, as a matter of law this is
19 the way we think the statute really should have
20 been written.

21 MR. McLAUGHLIN: Well, Commissioner, you
22 have the duty to interpret the statute.

23 ASSOCIATE MEMBER GEESMAN: Correct.

24 MR. McLAUGHLIN: And so they provide you
25 the broad policy principles and then you interpret

1 the details. And so clarification is one of also
2 the obligations you have under OAL.

3 So, I'm not sure I quite understand you
4 saying that you're not allowed to clarify the
5 statute. That's your duty.

6 ASSOCIATE MEMBER GEESMAN: We tried to
7 clarify it by allowing an incidental bump up to 10
8 percent increase in capacity. We were struck down
9 by OAL. You're suggesting, I think, substantially
10 broader than a 10 percent incidental increase in
11 capacity by the breadth of your language. And I
12 guess what I'm trying to convey is that I don't
13 know that that's the way that the regulatory
14 process is intended to work. We're supposed to be
15 narrowing the interpreted items in the statute.
16 And OAL, in this case, has made that quite clear.
17 They thought it was an over-reach for us to put
18 the 10 percent provision in there.

19 MR. McLAUGHLIN: Well, of course, I --
20 ar they listening?

21 ASSOCIATE MEMBER GEESMAN: They read.

22 MR. McLAUGHLIN: Yeah, they read.

23 (Laughter.)

24 MR. McLAUGHLIN: It was a
25 misinterpretation.

1 ASSOCIATE MEMBER GEESMAN: I agree with
2 that.

3 MR. McLAUGHLIN: Yeah. As I'm stating
4 from our written arguments and my oral arguments
5 here, if you constrain activities of POUs, proper
6 activities because they do not violate the
7 principles of 1368, as stated in section 1, you
8 are violating the law then. You are not
9 effectuating the purpose.

10 And so I'm saying that if we go with the
11 proposed language of NRDC, which duplicates,
12 replicates the CPUC language, that will violate
13 1368 principles.

14 We need more clarity. And this is a
15 workshop, and so this was a proposed language. If
16 we want to craft on the fly to more accurately
17 define, give more guidance to the POUs as they go
18 forward, that's okay with me. That's what we're
19 here for.

20 ASSOCIATE MEMBER GEESMAN: Let me go,
21 then, to the comply-with-legal-requirements
22 provision that is in your suggested language. It
23 seems to me, and I can't cite you the section
24 number, but I believe the regs that we put forward
25 in OAL, and which OAL signed off on, include some

1 exemption covered by a prior agreement, or
2 something to address the JPA --

3 MR. McLAUGHLIN: Right, 2913.

4 ASSOCIATE MEMBER GEESMAN: Is that not
5 sufficient?

6 MR. McLAUGHLIN: No, I'm thinking that
7 it more accurately defines the trigger on the
8 five-year prong. I think there is room to
9 interpret that in various ways. Is that a
10 mechanical lifetime; is that an economic lifetime;
11 is that where a new reg comes out and says that
12 you need to paint yellow lines on all the plant
13 machines so that people go no closer than three
14 feet? Therefore an OSHA regulation all of a
15 sudden causes you to extend the life of the plant
16 because you would have to comply with that to keep
17 operating the plant?

18 Well, there's a multitude of laws like
19 that. So, as far as legal requirements, it could
20 be statutory, it could be regulatory. But unless
21 this is triggered by some sort of mechanical
22 aspect, or some determination on this extend-the-
23 life prong, we can get into real grey area.

24 ASSOCIATE MEMBER GEESMAN: But if you do
25 get into that situation you come to the

1 Commission; you get guidance. We provide some
2 form of guidance. Isn't that a better way to
3 operate government than for us today to say, as a
4 matter of law, we're going to create that general
5 exemption for anything to comply with legal
6 requirements?

7 MR. McLAUGHLIN: I guess now we're
8 talking about the paradigm of local control versus
9 state control here, and so I certainly represent
10 the local publicly owned utilities. And we have a
11 lot of laws upon us to make the right decisions,
12 1368, Brown Act, et cetera, et cetera. And so we
13 need to follow those laws.

14 To have an extra layer on top, and
15 especially when we're making decisions sometimes
16 months or years in advance, having more guidance
17 in the regs is what we're looking for.

18 The time to actually come to this
19 Commission may be well beyond the time when we're
20 actually looking at these activities.

21 So I'm arguing for a better reg which
22 gives us more guidance.

23 ASSOCIATE MEMBER GEESMAN: And I don't
24 disagree with what you're saying, but I represent
25 the five timid mice. And I only get the cheese

1 that the elected cats provide. And I'm suggesting
2 that guidance in a statutory configuration needs
3 to come from the elected cats.

4 MR. McLAUGHLIN: And going back to my
5 first argument, and the core of my argument is
6 that that's exactly right. So we're trying to
7 effectuate the purpose. We look at (i) and (j)
8 and so we're trying to prevent things that would
9 increase the probability of financial and
10 reliability risk.

11 And so if there are activities that
12 decrease, actually decrease, and those are
13 captured here, and some how prescribed, we've
14 cross the line.

15 And so --

16 ASSOCIATE MEMBER GEESMAN: Okay, I
17 understand that argument. The last thing I wanted
18 to ask you, Bruce, was if you would repeat or
19 restate the argument you've made here several
20 times in this proceeding before today, which is
21 why you do not believe that simple conformity to
22 the PUC definition is the appropriate way to
23 approach this.

24 MR. McLAUGHLIN: I don't think that
25 first in time is not first in right. And because

1 they made the rules before you doesn't mean that
2 they made the right rules, and therefore you would
3 have to follow a rule that is bad. So, right
4 away, that logical argument.

5 But also in 1368, itself, if you go to
6 the consistency language it only applies to the
7 EPS, itself. And yours is exactly -- it's the
8 same, 1100 pounds.

9 So you must be consistent with their
10 EPS. And then you may follow some of their
11 procedures for verification of the baseload
12 generation. But that's not an obligation. You
13 may follow. And that's the only time the statute
14 talks about the two being the same.

15 They are two entirely different
16 subsections. If everything was going to be the
17 same they could have made it -- you know that.

18 But nonetheless, so that's my argument,
19 that consistency will not support or cause
20 particular language to crumble except on the EPS,
21 itself.

22 ASSOCIATE MEMBER GEESMAN: Thank you.

23 MS. CHANG: And I would argue that the
24 consistency is not just with the number, itself.
25 It is the types of triggers, the applicability of

1 the standard.

2 I agree that the CEC does not have to be
3 completely consistent with the PUC in terms of
4 enforcement, which is why we went through the
5 entire proceeding and finally got to a point where
6 we agreed.

7 But I do think the consistency does
8 apply not just to the number, but to the
9 applicability of that number. And to what types
10 of investments that standard should apply to.

11 I'd like to say that, you know, I
12 definitely agree with Commissioner Geesman there.
13 I would be a lot more comfortable with the case-
14 by-case exemption rather than just a blanket
15 exemption in the regulations here.

16 MR. McLAUGHLIN: Just pulling out the
17 actual sections. The 8341(e)(1), the greenhouse
18 gases emissions performance standard, which is a
19 defined term, or a term of art, established by the
20 Energy Commission for POUs shall be consistent
21 with the standard adopted by the Commission for
22 load-serving entities.

23 So, that's fulfilled; 1100 pounds is not
24 only consistent, it's exactly the same, precisely
25 the same.

1 And then the only other language that
2 would implicate any sort of similarity is
3 8341(c)(2) the Energy Commission may, in order to
4 insure compliance with the greenhouse gases
5 emissions performance standard by POUs apply the
6 procedures adopted by the Commission to verify the
7 emissions of greenhouse gases.

8 So, in other words, you may, and it's
9 only for the process of verifying emissions. And
10 you're doing that the same, too. You're looking
11 at the contracts and all the stuff you do is
12 pretty much lined out below in the successive
13 subsections.

14 But that's why we would argue that
15 consistency is not a viable argument for
16 supporting language.

17 But, I mean, that sort of separates us a
18 little bit. I think we're actually closer than
19 that would convey.

20 MS. CHANG: Yeah, and I'd like to just
21 clarify, I don't think we're arguing for
22 consistency with the PUC rules just simply for
23 consistency's sake. But it does make sense that
24 in terms of the applicability of the standard,
25 when you say it's the standard, it's not just the

1 number that you're referring to. It's the entire,
2 you know, what the standard applies to.

3 And I think there is a very strong
4 argument for insuring that on a statewide basis
5 all entities who are subject to the SB-1368
6 requirements are subject to the same requirements
7 for the applicability of that standard. It's not
8 just the number, itself.

9 MR. McLAUGHLIN: And we disagree on
10 that.

11 MS. CHANG: Yeah. Well, and I think
12 that the case-by-case exemption allows also room
13 for the two Commissions to be able to coordinate
14 and make sure that's being interpreted on a
15 consistent basis statewide.

16 MR. McLAUGHLIN: And so to fall back to
17 that. If, in fact, that we're to argue the
18 consistency argument, I would say you'd better go
19 look at the language of the decision and look at
20 all the stuff that they expressly excluded,
21 pollution control equipment, et cetera. They
22 were, you know, at least put a paragraph on it.

23 And so here we don't have the same sort
24 of leeway. And so I could see an IOU going out
25 there and doing things that the POUs would be on

1 our knees to this Commission to ask whether we can
2 do or not. And that's just not the way to go.

3 But I would also argue that the
4 Commission probably didn't go far enough, the
5 Public Utilities Commission. And so you shouldn't
6 be constrained.

7 But, even -- well, that's enough.

8 PRESIDING MEMBER BYRON: While you're
9 taking a break, I didn't want to interrupt
10 Commissioner Geesman's line of questioning; I
11 found that to be very helpful.

12 But I wanted to go back to a point that
13 you made earlier, and that is that I'm very
14 sympathetic to whether it was the Legislature's
15 law or our regulations that, I forget Commissioner
16 Geesman's analogy about the cheese, but whoever
17 provided the cheese issue that we're dealing with
18 today, I'm very sympathetic to the aspect of
19 providing clarity so that publicly owned utilities
20 can make investment decisions, that they can have
21 certainty around decisionmaking.

22 But to the extent that we're limited by
23 the law, the legislation I should say, it's
24 incumbent upon us to come up with regulations that
25 are going to be acceptable to OAL.

1 So, we're going to pursue a path in my
2 mind that provides you as much clarity, but still
3 meets the requirements of our administrative law
4 review.

5 MR. McLAUGHLIN: Commissioner, I agree
6 with that one hundred percent. And so, of course,
7 our recommendations here, we believe that those do
8 comply with the statute. And so I won't
9 articulate it for the third time why we think so.

10 PRESIDING MEMBER BYRON: Good.

11 (Laughter.)

12 MR. McLAUGHLIN: However, --

13 (Laughter.)

14 MR. McLAUGHLIN: Well, are we going to
15 discuss things here and now, or are we going to
16 wait for 15-day language? I mean, is what's on
17 the table, is it the language that's proposed by
18 NRDC? Is it any emission increase is now the last
19 prong, and that's the thing we have to deal with
20 here? Or are we talking about the 10 percent and
21 whether we should shove it up into the first
22 section on routine maintenance?

23 PRESIDING MEMBER BYRON: We haven't made
24 that determination. That's the purpose of this
25 meeting, to get all the information and the input

1 that we can from the parties. And hopefully
2 agreement from the parties.

3 Is there anyone else on the dais or in
4 the public that wishes to comment on this
5 particular issue?

6 Yes, sir. Please identify yourself.

7 MR. HOPPER: I'm Martin Hopper; I'm the
8 Director of MSR Public Power Agency. What I would
9 like to do is just amplify a little bit on our
10 concerns here of needing the leeway for complying
11 with the legal and regulatory matters, the actions
12 that may be imposed upon us by the federal
13 government through the Clean Air Act, the Clean
14 Water Act, et cetera, where we may be faced with a
15 circumstance where we would have to terminate the
16 operation of a existing facility if we were unable
17 to achieve a approval at the state level to effect
18 those federally required improvements, whatever
19 they may be.

20 One of the goals of the act or the
21 statute is to protect the financial interest of
22 the ratepayers and not subject them to unnecessary
23 risk. And I would offer to you that we are going
24 to subject our ratepayers to significant economic
25 risk in the circumstance.

1 If, for example, with MSR's investment
2 in the San Juan project we have additional Clean
3 Air Act requirements that are imposed upon us in
4 the next half-dozen years, for example, and
5 because that station emits approximately 2000
6 pounds, it clearly does not meet the emissions
7 performance standard.

8 But right now the ratepayers of the
9 Cities of Santa Clara, Redding and the Modesto
10 Irrigation District are enjoying the benefit of
11 their investment as they continue to pay the debt
12 service on that plant.

13 But if we were unable to comply with
14 ongoing federal requirements, those ratepayers'
15 investment is at risk. They would end up, if you
16 will, paying debt service on a plant that could no
17 longer be operated, and could no longer recover
18 their investment or serve their load.

19 So we think that the exemption -- and I
20 hate to call it an exemption, but this leeway that
21 we're looking for to allow us to comply with
22 imposed legal requirements is very necessary to
23 meet the very intent of the bill, which is to
24 protect the ratepayers from financial risk.

25 Thank you.

1 ASSOCIATE MEMBER GEESMAN: Let me say it
2 was the San Juan circumstance that prompted us to
3 the 10 percent approach. And I think that the
4 arguments you make are quite compelling to me. I
5 think they would probably be easier to rule upon
6 for the full Commission were they put in the form
7 of a plant-specific case-specific setting.

8 I think the difficulty that we find
9 ourselves in is ruling generically now in advance
10 of any such specific circumstance, that we will,
11 in fact, create a carve-out of the applicability
12 of 1368 to a very general set of circumstances.

13 And I think I heard Ms. Chang,
14 representing the environmental organizations,
15 indicating that on a case-specific basis she might
16 be a lot more comfortable with particular
17 circumstances than she is on a generic basis.

18 And I'm hopeful that we have preserved
19 sufficient authority for a future Commission to
20 make those types of determinations on a case-
21 specific basis.

22 Mr. McLaughlin makes very compelling
23 arguments that there's nothing in 1368 that says
24 we're supposed to apply it to stupid results, or
25 implausible results, or clearly counter-intuitive

1 results. And I'm hopeful that a future
2 Commission, when asked to apply the provisions of
3 these regs and the statute, can avoid stupid or
4 implausible or counter-intuitive results.

5 And certainly the example that you've
6 raised here today, and in prior workshops that
7 we've had, we found compelling.

8 MR. HOPPER: Thank you, Commissioner.
9 And I feel somehow I'm preaching to the choir, but
10 I think the extent we can build this in the record
11 and show it in our proposed revised regulations
12 and the support there.

13 And I think what Bruce, on behalf of
14 CMUA, has been arguing for is to lay down
15 something reasonably broad, but defined within the
16 regulation, to avoid us having to go through the
17 pitfall of trying to dream up every possible
18 circumstance and enumerate it within the
19 regulation.

20 Thank you.

21 DR. KENNEDY: I also had a question
22 about the example that you're raising because of
23 the particular context in which we're debating
24 what language should be here, relates to
25 circumstances in which an investment would result

1 in increased rated capacity.

2 Do you anticipate that having new air
3 pollution, Clean Air Act requirements placed on
4 San Juan in implementing that, that that could
5 result in increased capacity?

6 MR. HOPPER: Yes, we do. And I will
7 illustrate that by the example of the project that
8 is now under construction at the San Juan
9 facility. We are in a large environmental
10 improvement project coming out of the 2005 consent
11 decree that was entered into between the plant
12 owners, the Grand Canyon Trust and the New Mexico
13 Environmental Department.

14 And because of the attendant
15 improvements within the facility across the
16 station that is resulting, to my recollection, in
17 about a 50 megawatt increase in capacity across
18 the station. And that was purely as a -- I'll
19 call it a side benefit of the project.

20 The circumstances in the future could be
21 similar, as you replace components, perhaps, to
22 meet environmental requirements you're going to be
23 replacing them with the most modern and the latest
24 technology, which will be inherently more
25 efficient than the late 1960s, mid 1970s designs

1 that are the heart of the station.

2 DR. KENNEDY: Thank you. I also am
3 curious whether you're concerned particularly
4 about a circumstance where the other owners are
5 essentially voting to move ahead with the
6 investments and MSR, because of the regulations
7 under 1368, would be forced to vote against that.

8 MR. HOPPER: Yes, that is one of our
9 concerns. However, in many places within the
10 regulations and the portions of the regulations
11 that OAL accepted, we have addressed a lot of that
12 concern. And we're just trying to bring it around
13 full circle so we don't have a gap here.

14 DR. KENNEDY: Okay, thank you.

15 MR. HOPPER: Thank you.

16 PRESIDING MEMBER BYRON: Is there anyone
17 else present or on the phone that would like to
18 speak to this issue? I understand that we can
19 open up the phone at my request, is that right?

20 DR. TOOKER: Correct; and to date, at
21 this time we don't have any requests for comment.

22 PRESIDING MEMBER BYRON: Okay, thank
23 you, Chris.

24 Anyone else? Okay.

25 ASSOCIATE MEMBER GEESMAN: I think we

1 need to come up with 15-day language and put it on
2 the Commission agenda hopefully by -- when can we
3 get it on? the August --

4 MS. DeCARLO: The August 29th business
5 meeting, yeah.

6 PRESIDING MEMBER BYRON: Is there any
7 other issues that we need to discover here -- I
8 mean cover here in order to make sure we're
9 addressing -- I'm thinking of item D.

10 I will recognize you. Just one moment,
11 please.

12 MS. DeCARLO: The CMUA spoke today in
13 their written comments. And when we propose 15-
14 day language we could then include in that notice
15 an explanation of why we believe the language
16 we're proposing satisfies the necessity standard.

17 PRESIDING MEMBER BYRON: Okay. Please.
18 Please introduce yourself.

19 MS. LUCKHARDT: I'm Jane Luckhardt on
20 behalf of the Sacramento Municipal Utility
21 District. And I'd just like to take a minute and
22 thank Kevin Kennedy for the time and effort that
23 he has spent in developing and working with the
24 POUs on these regulations and on the greenhouse
25 gas issues in general.

1 And we know he's moving on to ARB, so
2 we're not going to lose him completely, but wanted
3 to take a moment to thank him for his service at
4 this Commission.

5 (Applause.)

6 DR. KENNEDY: Thank you, that was very
7 nice. Thank you.

8 PRESIDING MEMBER BYRON: Ms. Luckhardt,
9 thank you. We all agree. We're sorry to be
10 losing him here at the Energy Commission. But
11 we're glad that he'll be working on things that
12 are extremely important to him at the Air
13 Resources Board, and it's a good opportunity for
14 him. So, we agree, but we're also glad the
15 state's not losing him.

16 Is there anyone else that would like to
17 comment? If not, I think we're going to go ahead
18 and adjourn the meeting. Going once.

19 Thank you all very much for being here
20 today.

21 (Whereupon, at 9:58 a.m., the public
22 workshop was adjourned.)

23 --o0o--

24

25

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